80-874

FILED
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MICHAEL RODAK, JR., CLE

NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOSEPH M. MATHEWS,
Petitioner,

v.

THE STATE OF OREGON,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF OREGON

PETITION FOR WRIT OF CERTIORARI

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Counsel for Respondent

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NO.

IN THE

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OCTOBER TERM, 1980

JOSEPH M. MATHEWS,

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Counsel for Respondent

Question Presented for Review

Whether an alleged mentally ill person has a right to remain silent in an involuntary, civil commitment proceeding under the Fifth and Fourteenth Amendments to the United States Constitution.

Opinion Below

The opinion of the Court of Appeals, reported at 46 Or. App. 757 (1980), appears in the Appendix hereto. No opinion was rendered by the Supreme Court of Oregon which denied review of the Court of Appeals decision on September 3, 1980.

Jurisdiction

The judgment of the Court of Appeals for the State of Oregon was entered on June 23, 1980. A timely Petition for Review was denied by the Supreme Court of Oregon on September 3, 1980; and the Court of Appeals judgment became final on September 11, 1980. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

Constitutional Provisions Involved

Constitution of the United States: Fifth Amendment.

> "No person . . . shall be compelled in any criminal case to be a witness against himself. . ."

Constitution of the United States: Fourteenth Amendment.

> "[N]or shall any state deprive any person of life, liberty, or property without due process of law . . ."

Statutes Involved

Oregon Revised Statute 426.120:

> "The persons appointed to conduct the examination shall examine the person as to his mental condition and make their separate reports in writing, under oath, to the court, which reports immediately shall be filed with the clerk of the court. If the examining persons find, and show by their reports, that the person examined is a mentally ill person, the reports shall include a recommendation as to the type of treatment

facility best calculated to help the person recover from his mental illness. Each report shall also advise the court whether in the opinion of the examiner the mentally ill person would cooperate with and benefit from a program of voluntary treatment."

Statement of the Case

On December 4, 1979, the Circuit Court of the State of Oregon for Lane County commenced a hearing to determine whether Petitioner was a "mentally ill person" under Oregon law. Petitioner had been taken into custody pursuant to a "Warrant of Detention" which was issued after "Notification of Mental Illness" was filed with the Court.

At the hearing on December 4, 1979, Petitioner was represented by Court-appointed counsel. The state called four witnesses; and, following their brief testimony, the Court informed the Petitioner that a physician and a psychologist sitting across from him would be asking him questions. At that time Petitioner by his attorney orally informed the Court that he wished to assert his Fifth Amendment privilege to remain silent during the hearing. The Court immediately ruled that the commitment proceeding was civil in nature and that Petitioner had no Fifth Amendment privilege. The Court, pursuant to Oregon Revised Statute 426.120, then directed Petitioner to answer the questions, which he did. The following colloquy occurred at the trial stage of these proceedings at page 11 and 12 of the official transcript:

> "Mr. Shepard [attorney for Petitioner]: Your Honor, Mr. — excuse me — Mr. Mathews wishes to remain silent during this hearing.
>
> Mr. Mathews: Or whatever.
>
> The Court: I presume you can go ahead and exercise that right, but I can assure you that he will be directed to answer questions.

Mr. Shepard (nodding affirmatively): We have discussed this.

The Court: This is not a criminal matter.

Mr. Shepard: Well, it is a procedure that could lead to loss of liberty, I suggest, and on that basis, the Fifth Amendment would still apply.

The Court: It does not, as far as I am concerned. The whole, sole purpose of medical examiners is to determine whether or not this person is suffering from a mental disorder. We have gone through this before, Mr. Shepard. If you want to take it up one of these days, that is fine. I just don't believe it. It is not a criminal matter. It is a civil proceeding. There is nothing within the statutes giving him that right.

Mr. Shepard: Well, even in civil procedures, Constitutional rights still inure. Well, this is not productive. This is something between the judge and myself. So, I have stated my client's desire, as stated to me.

The Court: I would direct you, Mr. Mathews, to try and answer these people as best as you can.

Mr. Mathews: Okay, your Honor, whatever you say."

After extensive questioning of the Petitioner, the Court committed him to confinement at the Oregon State Hospital for a period not to exceed 180 days.

The Oregon Court of Appeals affirmed the commitment order and rejected Petitioner's claim that he had the right to remain silent in a civil commitment proceeding. The Oregon Supreme Court denied review.

Reasons Relied Upon for the Granting of the Writ

I

THE OREGON COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION OF SUBSTANCE NOT HERETOFORE DETERMINED BY THIS COURT.

The Oregon Court of Appeals held that the Fifth Amendment to the United States Constitution does not apply to an allegedly mentally ill person in a civil commitment proceeding. The Court correctly noted that, "The United States Supreme Court has never ruled on this issue." Page A-3, Appendix hereto.

The issue raised in this Petition has been previously presented to this Court, but it was not reached in resolving the case. *McNeil v. Patuxent Institution Director,* 407 U.S. 245, 92 S.Ct. 2083, 32 L.Ed.2d 719 (1972). In his concurring opinion, however, Mr. Justice Douglas stated that the Fifth Amendment privilege *did* apply to any statements that might serve as basis for commitment because, "there is harm and self-incrimination whenever there is deprivation of liberty; and there is such a deprivation * * * if a person is held against his will." *Id.,* at 257.

II

THERE IS CONFLICT AMONG STATE AND FEDERAL COURTS ON THIS ISSUE, THE RESOLUTION OF WHICH WILL AFFECT EVERY CIVIL COMMITMENT PROCEDURE IN THE UNITED STATES.

> "The expanding concern of society with problems of mental disorders is reflected in the fact that in recent years many states have enacted statutes designed to protect the rights of the mentally ill." *Addington v. Texas,* 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979).

Controversies over these civil commitment statutes are just beginning to reach this Court for final resolution. There is presently no consensus among lower courts on the important issue raised in this Petition: *Lessard v. Schmidt,* 349 F.Supp. 1078 (E.D. Wis. 1972), *vacated and remanded on*

other grounds, 414 U.S. 373 (1974), *on remand* 379 F.Supp. 1376 (E.D. Wis. 1974), *vacated and remanded on other grounds,* 421 U.S. 957 (1975), *on remand* 413 F.Supp. 1318 (E.D. Wis. 1976); *Suzuki v. Quisenberry,* 411 F.Supp. 1113 (D. Hawaii 1976), *as amended Suzuki v. Alba,* 438 F.Supp. 1106 (D. Hawaii 1977); *Commonwealth ex rel Finken v. Roop,* 234 Pa. Super. Ct. 155, 339 A.2d 764 (1976), *cert. den.* 424 U.S. 960 (1976); *French v. Blackburn,* 428 F.Supp. 1351 (M.D.N.D. 1977); *Lynch v. Baxley,* 386 F.Supp. 378 (M.D. Ala. 1974).

Decisions of this Court contain reasoning and dicta that conflict with the opinion of the Oregon Court of Appeals in this case. In *Murphy v. Waterfront Commission,* 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964), this Court held that "the privilege against self-incrimination and the right to remain silent can be claimed in any proceeding, be it criminal or civil, administrative or judicial, investigatory or adjudicatory." 378 U.S. at 49-50.

In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967), recognized that the availability of the privilege turns upon the nature of the statement, and the exposure which it invites:

> "The privilege may, for example, be claimed in a civil or administrative proceeding if the statement is or may be inculpatory . . . [c]ommitment is a deprivation of liberty. It is incarceration against one's will, whether it is called 'criminal' or 'civil'. And our Constitution guarantees that no person shall be 'compelled' to be a witness against himself when he is threatened with deprivation of his liberty — a command which this Court has broadly applied and generously implemented in accordance with the teaching of the history of the privilege and its great office in mankind's battle for freedom." 387 U.S. at 49.

It is significant that an individual in the position of the Petitioner is subject to questioning by examiners highly skilled in psychological domination: psychologists and psychiatrists.

The question presented by this Petition involves a basic

constitutional right that theoretically can be asserted in any civil commitment proceeding in any state. The disagreement between the lower courts on whether the right can be raised leaves its protection to the fortuity of one's location, a situation that must be changed.

Conclusion

The issue presented in this Petition is simply stated; however, the rights and interests which are affected are so integral to our system that the Petition should be granted.

Respectfully submitted,

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Appendix

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of Joseph M. Matthews
Alleged to Be a Mentally Ill Person,

The State of Oregon,

Respondent,

v. No. 57-79-11052
CA 16455

Joseph M. Matthews,

Appellant.

*****

Appeal from Circuit Court, Lane County.

William A. Beckett, Judge.

Argued and submitted May 19, 1980.

Ross M. Shepard, Assistant Director, Public Defender Services of Lane County, Inc., Eugene, argued the cause and filed the brief for appellant.

James C. Rhodes, Assistant Attorney General, Salem, argued the cause for respondent. With him on the brief were James M. Brown, Attorney General, and Walter L. Barrie, Solicitor General, Salem.

Before Gillette, Presiding Judge, and Roberts and Campbell, Judges.

GILLETTE, P. J.

Affirmed.

FILED: 6/23/80

GILLETTE, P. J.

This is an appeal from an order of committment finding appellant to be a mentally ill person as defined in ORS 426.005(2). The sole issue on appeal is whether an alleged mentally ill person has a right to remain silent in a civil commitment proceeding. The trial court concluded that the Fifth Amendment privilege did not apply and directed appellant to speak. We affirm.

Initially the state contends that, because appellant did not refuse to testify, he did not preserve his constitutional objection. We disagree. Appellant informed the court of his desire to remain silent. He testified only after the court directed him to do so. In light of the trial court's order, appellant's Fifth Amendment claim is properly before us.

An involuntary civil commitment is a serious deprivation of liberty. It is well established that such proceedings must comport with due process. O'Conner v. Donaldson, 422 US 563, 95 S Ct 2486, 45 L Ed 2d 396 (1975); State v. Mills, 36 Or App 727, 585 P2d 1143 (1978), rev den 285 Or 195 (1979). Just what process is due, however, is another question. The United States Supreme Court has never drawn the line between the rights that must be afforded to civilly committed persons and those which need not be.

The Fifth Amendment to the United States Constitution

states that no person "shall be compelled in any criminal case to be a witness against himself." The privilege against self incrimination has been extended to "any proceeding, be it criminal or civil, administrative or judicial, investigatory or adjuticatory * * *" wherein the individual may reasonably apprehend that his statements may "be used in a criminal prosecution or which could lead to other evidence that might be so used." Murphy v. Waterfront Commission of New York, 378 US 52, 94, 84 S Ct 1594, 12 L Ed 2d 678 (1964). The availability of the privilege does not depend "upon the type of proceeding in which it is invoked but upon the nature of the statement or admission and the exposure it invites." In re Gault, 387 US 1, 49, 87 S Ct 1428, 18 L Ed 2d 527 (1967).

It is clear that an alleged mentally ill person can assert his Fifth Amendment privilege in a civil commitment proceeding whenever his testimony might implicate him in a criminal matter. We have recognized this right in State v. Troupe, 36 Or App 875, 586 P2d 95 (1978), rev den 286 Or 521 (1979). Appellant, however, would have us go further and hold that an alleged mentally ill person can refuse to talk whenever his statements, whether in a psychiatric interview or in court, may be used as a basis for his civil commitment.

The United States Supreme Court has never ruled on this issue. In McNeil v. Patuxent Institution Director, 407

US 245, 250, 92 S Ct 2083, 32 L Ed 2d 719 (1972), the court was presented with the issue but declined to reach it. In a concurring opinion, Justice Douglas concluded that the Fifth Amendment privilege did apply to any statements that might serve as a basis for commitment because "there is harm and self-incrimination whenever there is a deprivation of liberty; and there is such a deprivation * * * if a person is held against his will." Id., at 257. Other courts considering the matter have reached differing results. In Lessard v. Schmidt, 349 F Supp 1078, 1101, (ED Wis 1972), vacated and remanded on other grounds, 414 US 373 (1974), on remand 379 F Supp 1376 (ED Wis 1974), vacated and remanded on other grounds, 421 US 957 (1975), on remand 413 F Supp 1318 (ED Wis 1976), the court, relying on Justice Douglas' concurring opinion in McNeil, concluded that the state could not commit an individual on the basis of his statements to examining psychiatrists or others, in the absence of a showing that the statements were made voluntarily after the individual was given notice of the fact that his statements might contribute to his commitment and that he was not obliged to speak. See also Suzuki v. Quisenberry, 411 F Supp 1113 (D Hawaii 1976), as amended Suzuki v. Alba, 438 F Supp 1106 (D Hawaii 1977); and Commonweath ex rel Finken v. Roop, 234 Pa. Super. 155, 339 A2d 764 (1975), cert den 424 US 960 (1976). Other courts have limited the right in civil commitment proceedings to its

traditional reach, viz., where the testimony might contribute to a criminal prosecution. See French v. Blackburn, 428 F Supp 1351 (MD N. C. 1977), aff'd ____US ____, 99 S Ct 3091 L Ed 2nd (1979), and Lynch v. Baxley, 386 F Supp 378 (MD Ala. 1974).

Appellant, as did Justice Douglas in McNeil, relies to a great extent on the Supreme Court's decision in In Re Gault, supra. In that case, the Court held that juveniles are protected against self-incrimination in delinquency proceedings. However, that decision is limited. It applies only to proceedings where the child is charged with committing a delinquent act which could result in his commitment to a state institution. The right is applicable not only because of the threatened loss of liberty but because of the possibility of transfer to adult court and to insure that confessions are not coerced. Recently, in Addington v. Texas, 441 US 418, 99 S Ct 1804, 60 L Ed 2d 323 (1979), the Court, in considering the burden of proof required in involuntary committment proceedings, distinguished those proceedings from delinquency proceedings. It noted that in civil commitment cases, unlike delinquency cases, the state's power is not exercised in a punitive sense. Id., at 428. Moreover, the inquiry in the two proceedings is different. In delinquency proceedings, "the basic issue is a straightforward factual question--did the accused commit the act alleged." In committment cases, on the other hand whether the person is

mentally ill and in need of confined treatment "turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists." Id., at 429.

There being no binding precedent which is in point, we decide for ourselves whether due process requires that alleged mentally ill persons be afforded the right to remain silent in involuntary commitment proceedings whenever their testimony might be used as a basis for commitment. In determining the specifics of due process in any given situation three factors must be considered: first, the private interest that will be affected by the state's action; second, the state's interest; and, finally, the risk of an erroneous decision if the procedure is not applied. Addington v. Texas, supra, 441 US 425; see also Matthews v. Eldridge, 424 US 319, 335, 96 S Ct 893, 47 L Ed 2d 18 (1976).

The interest of the individual in this case is high: the threatened loss of liberty. Moreover, involuntary commitment may also "engender adverse social consequences to the individual" in the form of "stigma" or otherwise. Addington v. Texas, supra, 441 US 426. The state also has a significant interest.

> "The state has a legitimate interest under its parens patriae powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has the authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill." Addington v. Texas, supra, 441 US 426; see also

O'Conner v. Donaldson, supra, 422 US at 575; State v. O'Neill, 274 Or 59, 545 P2d 97 (1976).

In State v. O'Neill, supra, 274 Or at 72, the court held that Miranda warnings are not required before an individual is examined by psychiatrists or others pursuant to an involuntary committment proceeding. The court stated that "this is not a criminal proceeding and Miranda warnings, if required, could effectively frustrate the finding of mental health or illness." Idid. Precisely the same thing may be said of the present case. In Oregon, an individual can be involuntarily committed only if his condition at the time of the hearing demonstrates that he is a "mentally ill person" as that term is defined in ORS 426.005(2). State v. Allmendinger, 36 Or App 381, 383, 584 P2d 773 (1978); State v. Lucas, 31 Or App 947, 950, 571 P2d 1275 (1977). The best way to ascertain an individual's condition at the time of the hearing is to question him and observe his demeanor. It would be extremely difficult to commit persons in need of help if they refused to talk.

We are not unmindful of the significant private interest involved and the risk of erroneous deprivation of this interest. However, we are satisfied that the significant procedural and substantive safeguards which are presently afforded allegedly mentally ill persons in commitment hearings[1] amply assure a fair hearing and a correct result. See State v. O'Neill, supra, 274 Or 68, 69; State v. Allmendinger,

supra, 36 Or App 383; State v. Troupe, supra, 36 Or App at 882; State v. Fry, 36 Or App 297, 584 P2d 3541 (1978); State v. Nelson, 35 or App 57, 580 P2d 590 (1978); State v. Brooks, 35 or App 347, 581 P2d 134 (1978); State v. Alexander, 26 Or App 943, 554 P2d 524 (1976).

Affirmed.

FOOTNOTES

1

In Oregon, an alleged mentally ill person has the following rights in a civil commitment proceeding:

1. He must be found to have a mental disorder and be either dangerous or unable to provide for his basic personal needs or receive that care from others. ORS 426.005(2). This must be proven by clear and convincing evidence. ORS 426.130.

2. Right to a hearing and opportunity to be heard. ORS 426.070-426.130.

3. Notice of the hearing and the grounds thereof, and of his rights. ORS 426.070(3), 426.090.

4. Right to cross-examine witnesses. ORS 426.095.

5. Right to present evidence in his own behalf and subpoena witnesses. ORS 426.100(1).

6. Right to counsel, appointed if necessary. ORS 426.100(1), (3).

7. Right to a postponement. ORS 426.100(5).

8. Right to request that an additional examining physician of his own choice (besides the two appointed by the court) be appointed to examine him. ORS 426.110.

9. Right to receive a copy of the investigation report and any treatment report prior to the hearing. ORS 426.070(4), 426.075.

10. The investigation report can only be introduced in evidence with the express consent

of the person. ORS 426.095.

11. Record of the proceedings. ORS 426.160.

12. Right to appointed counsel on appeal. ORS 426.135.

There is no right to trial by jury, State v. Mills, 36 Or App 727, 585 P2d 1143, rev den 285 Or 195 (1978), and the alleged mentally ill person is not entitled to Miranda warnings before being examined. State v. O'Neill, 274 Or 59, 545 P2d 97 (1976).

SUPREME COURT COURT of APPEALS

ELIZABETH D. BELSHAW
[redacted]
State Court Administrator
378-6046

ADMINISTRATIVE OFFICE
SUPREME COURT BLDG.
SALEM, OREGON 97310

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August 8, 1980

Ross M. Shepard
Public Defender Services
72 West Broadway Suite 200
Eugene, OR 97401

Re: State vs. Joseph M. Matthews
CA 16455 SC 27180

Dear Mr. Shepard:

Pursuant to Rule of Procedure 10.10 the Court of Appeals has considered the Petition for Review filed in the above case and has on August 7, 1980, decided not to rehear the matter or change its decision. Therefore, the Supreme Court will proceed to determine whether to grant review. No mandate can issue until the Supreme Court has completed its review of the petition.

Yours very truly,

Carol Justis

Carol Justis
Records Administrator

CJ/vr
cc: James C. Rhodes

RECEIVED
AUG 1 - 1980
PUBLIC DEFENDER SERVICES
OF LANE COUNTY, INC.

A-12

MHD 309-13

FILED
AT .....O'CLOCK.....M
DEC 4 1979
Court Administrator
Circuit Court for Lane County, Oregon
BY _____ DEPUTY

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR LANE COUNTY

In the Matter of)
)
JOSEPH M. MATTHEWS,)
alleged to be a mentally ill person.)

ORDER OF COMMITMENT

Case No. 57-79-11052 (9)

By virtue of a notice filed in the above-entitled matter and citation issued to and served upon the above-named alleged mentally ill person, there appeared before the undersigned Judge at the hour of 1:00a. m. on the date hereinafter indicated the alleged mentally ill person and Ross Shepard, attorney; Dr. Marian Hayes, a competent physician licensed by the State Board of Medical Examiners for the State of Oregon to practice medicine and surgery; Dr. Isabelle Moser, ( )a competent physician or (X)a qualified mental health professional recommended by the Mental Health Division, State of Oregon; and _____, ( )a competent physician or ( )other qualified examiner, who were appointed by the Court to examine the alleged mentally ill person;

Whereupon the alleged mentally ill person was examined by the above-named examiners as to the person's mental condition; and

Having heard all of the evidence and reviewed the findings of the examining persons, it is the Court's opinion that Joseph M. Matthews is mentally ill beyond a reasonable doubt and is not willing and able to participate in treatment on a voluntary basis;

NOW THEREFORE IT IS ORDERED that the person be committed to the Mental Health Division for a period of time not to exceed 180 days.

DATED this 4th day of December, 1979.

Judge

(Over)

VOL. 20 PAGE 556

STATE OF OREGON)
) ss
County of Lane)

I certify that the attached copies are true copies of the complete record in the case entitled "In the Matter of Joseph M. Matthews _____, alleged to be a mentally ill person", as the same appears on file and of record in my office and in my custody.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of the Circuit Court of said County this 26th day of December, 1979.

By _____ Deputy

No. _____

_____ COURT OF OREGON

FOR _____ COUNTY

In the Matter of

_____ alleged to be a mentally ill person.

FILED
AT 8:45 O'CLOCK A M
SEP 12 1980
Court Administrator
Circuit Court for Lane County Oregon
BY [illegible]
DEPUTY

STATE OF OREGON

COURT OF APPEALS

In the Matter of Joseph M. Matthews Alleged to be a Mentally Ill Person.	JUDGMENT and MANDATE
STATE OF OREGON, Respondent,	Appeal from LANE County Circuit (P)
v.	No. 577911052 CA 16455
JOSEPH M. MATTHEWS, Appellant.	

This cause having come on to be heard on appeal and having been duly submitted and considered and the Supreme Court having denied review on September 3, 1980;

IT IS HEREBY ADJUDGED and ORDERED that the decision entered below in this cause is affirmed.

The cause is returned below for further proceedings pursuant to law and the opinion and order of the court entered June 23, 1980.

ISSUED at Salem, Oregon:

STATE OF OREGON,)
County of Marion.)

I, LOREN D. HICKS, State Court Administrator for the State of Oregon, do certify that this copy of ORDER is a correct transcript of the original, which is on file in my office.

IN TESTIMONY WHEREOF, I have affixed the seal of the Court at Salem, Oregon, this _____.

LOREN D. HICKS
State Court Administrator

by _____
Deputy Administrator

ALEXANDER L. STEVAS,
CLERK

No. 80-874

In the Supreme Court of the United States

OCTOBER TERM, 1980

JOSEPH M. MATHEWS,

Petitioner,

v.

THE STATE OF OREGON,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals for the State of Oregon

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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03/81

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In the Supreme Court of the United States

No. 80-874

OCTOBER TERM, 1980

JOHN M. MATHEWS,

Petitioner,

v.

THE STATE OF OREGON,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals for the State of Oregon

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondent, the State of Oregon, respectfully prays that this Court deny the Petition for Writ of Certiorari to the Oregon Court of Appeals. The opinion in this case is reported at 46 Or. App. 757, 613 P.2d 88 (1980).

QUESTION PRESENTED

Respondent submits that the question presented by this case more accurately is as follows:

Whether the Fifth and Fourteenth Amendments to the United States Constitution guarantee that, in an involuntary civil commitment proceeding, an allegedly mentally ill person may refuse to answer any or all questions on the ground that the answers may be used in that proceeding as a basis for involuntary commitment.

RESPONSE TO REASONS RELIED UPON FOR GRANTING THE WRIT

I.

THE OREGON COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION OF SUBSTANCE NOT HERETOFORE ADDRESSED BY THIS COURT IN A WRITTEN OPINION.

The issue raised in this case is whether the Fifth Amendment to the United States Constitution[1] guarantees that, in an involuntary civil commitment proceeding, an allegedly mentally ill person may refuse to answer any or all questions on the ground that the answers given may be used against him as a basis for involuntary commitment.

This case does not involve the right to refuse to answer any questions in an involuntary commitment proceeding if the answer might implicate the person in a criminal matter. The Oregon Court of Appeals correctly acknowledged such a right. *State v. Mathews,* 46 Or. App. 757, 760, 613 P.2d 88, 90 (1980).

This question was presented in *McNeil v. Patuxent Institution Director,* 407 U.S. 245, 92 S. Ct. 2083, 32 L. Ed.2d 719 (1972). In that case, a Maryland state prisoner was confined in a state institution due in part to his refusal to cooperate in a mental examination to

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[1]The Fifth Amendment is applicable to the states through the Fourteenth Amendment. *Malloy v. Hogan,* 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed.2d 653 (1964).

determine if he was a "defective delinquent." The majority resolved petitioner's challenge without reaching the Fifth Amendment issue. However, in a concurring opinion, Justice Douglas concluded that the Fifth Amendment privilege applied to any statements that might serve as a basis for commitment because "there is harm and self-incrimination wherever there is a deprivation of liberty; and there is such a deprivation * * * if a person is held against his will." *Id.* at 257.

The procedure at issue in *McNeil v. Patuxent Institution Director, id,* later was challenged on Fifth Amendment grounds in the Maryland Court of Appeals. The Maryland court held that the privilege against self-incrimination was inapplicable to proceedings under the defective delinquent statute. *Williams v. Director, Patuxent Institution*, 276 Md. 272, 347 A.2d 179, 195 (1975). This Court denied certiorari in that case. 425 U.S. 976, 96 S. Ct. 2178, 48 L. Ed.2d 801 (1976).

Subsequent to the decision in *McNeil v. Patuxent Institution Decision, supra,* and the denial of certiorari in *Williams v. Director, Patuxent Institution, supra,* this Court summarily affirmed a United States District Court decision which held that the Fifth Amendment privilege against self-incrimination was not applicable to information that might be used in civil commitment proceedings. *French v. Blackburn,* 443

U.S. 901, 99 S. Ct. 3091, 61 L. Ed.2d 869 (1979), *mem decision aff'g,* 428 F Supp 1351 (M.D.N.C. 1977). Although a summary affirmance is not entitled to the same weight as a written opinion, it is nevertheless a decision on the merits and it is entitled to some precedential weight. *See Meek v. Pittenger,* 421 U.S. 349, 367, n. 16, 95 S. Ct. 1753, 44 L. Ed.2d 217 (1975); *Edelman v. Jordan,* 415 U.S. 651, 671, 94 S. Ct. 1347, 39 L. Ed.2d 662 (1974). Thus, this Court has held that the Fifth Amendment privilege is not applicable to civil commitment proceedings, but it has not addressed the issue and treated it fully in a written opinion.

II.

ALTHOUGH THERE ARE SOME CONTRARY DECISIONS, STATE AND FEDERAL COURTS WHICH HAVE CONSIDERED THIS ISSUE ARE GENERALLY IN ACCORD.

Respondent has found only one authoritative decision holding that the Fifth Amendment privilege against self-incrimination applies to information that could be used in a civil commitment proceeding as a basis for involuntary commitment. In *Lessard v. Schmidt,* 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated on other grounds,* 421 U.S. 957, 95 S. Ct. 1943, 44 L. Ed.2d 445 (1975), a three-judge federal district court conducted a broad review of the Wisconsin commitment procedure and held that statements to a psychiatrist, unless made voluntarily after notice of the pos-

sible consequences, cannot provide a basis for commitment, because such statements are incriminating in effect. 349 F. Supp. at 1100-02. Other cases cited for that same proposition include *Suzuki v. Quisenberry,* 411 F. Supp. 1113 (D. Haw. 1976), *as amended sub nom, Suzuki v. Alba,* 438 F. Supp. 1106 (D. Haw. 1977), *rev'd in part, aff'd in part, dismissed in part sub nom, Suzuki v. Yuen,* 617 F.2d 173 (9th Cir. 1980); *Commonwealth ex rel Finken v. Roop,* 234 Pa. Super. 155, 339 A.2d 764 (1975), *cert den,* 424 U.S. 960 (1976). However, in *Suzuki v. Quisenberry, supra,* the Ninth Circuit Court of Appeals reversed the District Court of Hawaii on this point. In *Commonwealth ex rel Finken v. Roop, supra,* the Pennsylvania court was equally divided on the question with three judges holding that the Fifth Amendment applies to commitment proceedings, three judges holding that it does not, and one judge declining to reach the constitutional question.

A significant number of federal and state courts have held that the Fifth Amendment privilege does not protect against compulsory disclosure of information to be used in a commitment hearing. *Suzuki v. Yuen, supra; Gomes v. Gaughan,* 471 F.2d 794 (1st Cir. 1973) (dicta); *Tippett v. State of Maryland,* 436 F.2d 1153 (4th Cir. 1971), *cert dismissed as improvidently granted, sub nom, Muriel v. Baltimore Criminal Court,* 407 U.S. 355 (1972); *French v. Blackburn,* 428 F. Supp. 1351 (M.D.N.C. 1977), *aff'd mem,* 443 U.S.

901, 99 S. Ct. 3091, 61 L. Ed.2d 869 (1979); *Cramer v. Tyars,* 23 Cal. 3d 131, 151 Cal. Rptr. 653, 588 P.2d 793 (1979); *Kraemer v. Mental Health Board,* 199 Neb. 784, 261 N.W.2d 626 (1978), *cert den,* 441 U.S. 960 (1979); *Matter of Ottolini,* 30 Ill. Dec. 81, 73 Ill. App. 3d 971, 392 N.E.2d 736 (1979); *Moss v. State,* 539 S.W.2d 936 (Tex. Civ. App., 1976); *People v. Keith,* 38 Ill. 2d 405, 231 N.E.2d 387 (1967); *State ex rel Kiritsis v. Marion Probate Ct.,* 269 Ind. 550, 381 N.E.2d 1245 (1978); *State ex rel Hawks v. Lazaro,* 157 W. Va. 417, 202 S.E.2d 109 (1974); *Williams v. Director, Patuxent Institution, supra.*[2] The Oregon courts join this line of authority with the decision that is the subject of this petition. *State v. Mathews, supra.*

III.

THE OREGON COURT OF APPEALS CORRECTLY DECIDED THE QUESTION PRESENTED IN THIS CASE.

In this case, the Oregon Court of Appeals addressed the application of the Fifth Amendment privilege against self-incrimination in the context of involuntary commitment proceedings in a thorough and well-

[2] *Lynch v. Baxley,* 386 F. Supp. 387 (M.D. Ala. 1974), although cited by petitioner and by the Oregon Court of Appeals, does not squarely support either line of authority. The majority in that case held that the Fifth Amendment protects disclosures which might be used in a criminal proceeding or which could lead to other evidence that might be so used. 385 F Supp at 394. The dissent criticized the majority for not specifically addressing whether the Fifth Amendment protects disclosures that might be used in a civil commitment proceeding, and the dissent concluded that the privilege should not apply to such disclosures. *Id.* at 402 (Varner, dissenting).

reasoned opinion. As any proper analysis of the issue must, the opinion of the Oregon Court of Appeals included a discussion of this Court's decision in *In re Gault,* 387 U.S. 1, 47-48, 87 S. Ct. 1428, 18 L. Ed.2d 527 (1967). In that case, this Court held that the Fifth Amendment applied in juvenile delinquency cases because such proceedings, although denominated as civil, involve a deprivation of liberty and must be regarded as "criminal" for purposes of the privilege against self-incrimination. But, as the Oregon Court recognized, *Gault* does not support the view that any legal process which threatens confinement to a state institution requires the same constitutional protections as a criminal prosecution.[3] The decision in *Gault* was limited by its reasoning, which relied heavily on the criminal or quasi-criminal nature of the proceeding and of the sanction imposed. A significant aspect of the court's analysis in *Gault* was the recognition that juveniles are frequently confined in adult penal institutions; that they face possible transfer to adult courts for trial as adult offenders; that interrogation by police and other officials has the same potential for coercion with juveniles as it does with adult offenders; and that the realities of the handling of juvenile offenders suggest that such proceedings are frequent-

[3]This Court's unwillingness to apply criminal due process requirements inflexibly to all proceedings involving incarceration is demonstrated in *McKeiver v. Pennsylvania,* 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed.2d 647 (1971) where the Court held that due process does not require trial by jury in a juvenile delinquency case.

ly followed by disciplinary action rather than by individualized treatment. 387 U.S. at 50-51.

These considerations do not apply with the same force in civil commitment proceedings. In *Addington v. Texas,* 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979), this Court considered the burden of proof required in involuntary civil commitment hearings. The Court noted that in such cases, unlike delinquency cases, the state's power is not exercised for punitive purposes. *Id.* at 428. Moreover, the inquiry in the two proceedings is different. A delinquency proceeding is directed at "a straight-forward factual question — did the accused commit the act alleged?" *Id.* at 429. In contrast, the decision of whether a person is mentally ill and in need of confined treatment "turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists." *Id.*

Thus, the Oregon Court of Appeals correctly concluded that the applicability of the privilege against self-incrimination in commitment cases is not controlled by the determination in *Gault* that the privilege applies to juvenile delinquency proceedings. Rather, the Oregon court separately analyzed the question of what process is due in civil commitment cases and applied the factors set forth in *Addington v. Texas, supra,* 441 U.S. at 425. These factors are: first, the private interest that will be affected by the state's action; second, the state's interest; and third, the risk

of an erroneous decision if the procedure is not applied.

In making this analysis, the Oregon court properly balances the competing factors and considers several distinctive aspects of commitment proceedings which have influenced other courts in concluding that the privilege does not apply. First, the decision of the Oregon court recognizes that the interest of the individual is great because of the threatened loss of liberty. *See also French v. Blackburn, supra* at 1358. And, as discussed in *Addington v. Texas, supra,* 441 U.S. at 426, the Oregon decision recognizes that commitment can "engender adverse social consequences" in the form of stigma or otherwise.

But balanced against this individual interest is the legitimate interest of the state under its *parens patriae* powers in providing care for mentally ill persons and in protecting its citizens against injury from such persons. The right of the state to diagnose, care, treat and protect mentally ill persons who are dangerous or unable to care for themselves is one which weighs heavily in the analysis of the procedural process which is due in civil commitment hearings. *See e.g. Addington v. Texas, supra,* 441 U.S. at 426; *Gomes v. Gaughan,* 471 F.2d at 800; *French v. Blackburn,* 428 F. Supp. at 1359; *Moss v. State, supra,* 539 S.W.2d at 946-47; *State ex rel Kiritsis v. Marion Probate Ct., supra,* 381 N.E.2d at 1248. In this regard, the decision

of the Oregon Court of Appeals recognizes that expert diagnosis is an essential ingredient in the reliable identification of mental illness and that the effective use of civil commitment procedures might be seriously impaired or virtually eliminated by permitting an allegedly ill person to remain silent, either in a psychiatric interview or in court. *See also Gomes v. Gaughan, supra* at 799; *French v. Blackburn, supra* at 1359; *Commonwealth ex rel Finken v. Roop, supra,* 339 A.2d at 782 (Van der Vort, dissenting); *Moss v. State, supra,* 539 S.W.2d at 947; *State ex rel Hawks v. Lazaro, supra,* 202 S.E.2d at 126; *State ex rel Kiritsis v. Marion Probate Court, supra,* 381 N.E.2d at 1248.

The final factor to be considered is the risk of an erroneous decision occasioned by the denial of the privilege. Several courts, including Oregon's, have been persuaded that significant other procedural and substantive rights, such as the right to representation by counsel, the right to cross-examine witnesses and the right to an examination by a physician of the subject's choice, are adequate to assure a fair hearing and a correct result. *See e.g. Gomes v. Gaughan, supra* at 800; *Matter of Ottolini, supra* at 739; *Moss v. State, supra,* 539 S.W.2d at 947. Indeed, as recognized in *Moss v. State,* an effective psychiatric examination furthers the reliability of the commitment proceeding by ensuring that commitment will be based on the procedures recognized in the medical profession for

diagnosing the problems of the mentally disturbed patient. 539 S.W.2d at 947. Also, as stated by this Court in *Addington v. Texas*:

> "* * * It may be true that an erroneous commitment is sometimes as undesirable as an erroneous conviction. * * * However, even though an erroneous confinement should be avoided in the first instance, the layers of professional review and observation of the patient's condition and the concern of family and friends generally will provide continuous opportunities for an erroneous commitment to be corrected. Moreover, it is not true that the release of a genuinely mentally ill person is no worse for the individual than the failure to convict the guilty. One who is suffering from a debilitating mental illness and in need of treatment is neither wholly at liberty nor free of stigma. * * * It cannot be said, therefore, that it is much better for a mentally ill person to 'go free' than for a mentally normal person to be committed." (citations omitted) 441 U.S. at 428-29.

The Oregon court has struck the proper and necessary balance in weighing the foregoing considerations. Although a civil commitment proceeding must comport with due process, such a proceeding is not identical to a criminal prosecution and, for constitutional purposes, the two are not the same. Civil commitment is not punishment, either in its design or purpose. The state's interest in such a proceeding is the diagnosis, care, treatment and protection of mentally ill persons who are unable to care for themselves or who threaten

the safety of others in the community. Extension of the Fifth Amendment privilege to information that may potentially be used as a basis for involuntary civil commitment would seriously impair the effective use of such procedures. As this Court stated in *Addington v. Texas, supra,* practical considerations may limit the requirements of constitutional due process and a state should not be required to employ procedures that "may completely undercut its efforts to further the legitimate interests of both the state and the patient that are served by civil commitments." 441 U.S. at 430.

The Oregon court has joined the overwhelming majority of state and federal courts in concluding that the Fifth Amendment does not protect against the compelled disclosure of information which may be used as a basis for involuntary civil commitment. The decision of the Oregon Court of Appeals is correct in its analysis and conclusion, and its judgment should be allowed to stand.

CONCLUSION

Respondent, the State of Oregon, respectfully submits that the Oregon Court of Appeals correctly decided a substantial question of federal constitutional law in a manner consistent with the decisions of a clear majority of state and federal courts. There is no substantial conflict in the lower court decisions on this

issue. Respondents respectfully pray that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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